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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JUAN JESUS LEBARIO, Appellant.	)	2 CA-CR 2010-0359 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094799001

Honorable John S. Leonardo, Judge

AFFIRMED

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K E L L Y, Judge.

¶1 Following a jury trial, appellant Juan Lebario was convicted of attempted first-degree murder, aggravated assault with a deadly weapon, drive-by shooting, theft of a means of transportation, criminal damage, and fleeing from a law-enforcement vehicle.

He was sentenced to a combination of concurrent and consecutive terms totaling fifty years in prison. On appeal, Lebario argues the trial court erred by allowing in-court identifications he claims were tainted, by excluding evidence he characterizes as exculpatory, and by illegally aggravating his sentence for attempted first-degree murder. For the following reasons, we affirm.

Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Lebario stole a truck from M.B. at gunpoint. A witness, M.M., followed him, but Lebario soon stopped, got out of the truck, and pointed his gun at her, at which point she drove away. The following day, an Arizona Department of Public Safety ("DPS") officer, K.L., saw the truck on the highway, verified it was stolen, and pursued it. K.L. attempted to stop the truck, but the driver, whom he later identified as Lebario, refused to stop. K.L. then pulled his patrol car up next to the truck and Lebario fired shots at him. Law enforcement officers continued to pursue the vehicle, and ultimately stopped and arrested Lebario.

¶3 Lebario was indicted on seven counts resulting from these events. One count was dismissed, but he was convicted on all other counts and sentenced as noted above. This appeal followed.

Discussion

Identification by M.M. and M.B.

¶4 Lebario argues "[t]he trial court should have suppressed the . . . witnesses' in-court identification[s] of [him] because they were tainted by an unduly suggestive lineup procedure." Before trial, Lebario filed a motion to suppress M.M.'s and M.B.'s photographic lineup identifications as well as their proposed in-court identification.[1] After a hearing, the court denied the motion, concluding "the photographic lineup was not unduly suggestive." At trial, M.M. and M.B. testified about the pretrial identification and again identified Lebario.

¶5 In reviewing a trial court's decision on a motion to suppress, "we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). "We review the trial court's denial of [the defendant]'s motion to preclude . . . [an] in-court identification for an abuse of discretion." *State v. Leyvas*, 221 Ariz. 181, ¶ 9, 211 P.3d 1165, 1168 (App. 2009).

¶6 Under the Due Process Clause of the Fourteenth Amendment, pretrial identification procedures must be "conducted in a manner that is fundamentally fair and secures the suspect's right to a fair trial." *State v. Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d 1172, 1183 (2002). When a defendant challenges identification evidence, the trial court

[1]Lebario also requested the trial court to suppress an identification by a third witness. Because this witness did not appear at the hearing, the state withdrew her name and she did not testify. We therefore address Lebario's arguments as to M.M. and M.B. only.

must hold a pretrial hearing to determine its admissibility. *See State v. Dessureault*, 104 Ariz. 380, 384, 453 P.2d 951, 955 (1969). In doing so, the court must first determine whether the identification procedure was unduly suggestive. *Lehr*, 201 Ariz. 509, ¶ 46, 38 P.3d at 1183. If, as here, the court finds the procedure used was not unduly suggestive, it need not address whether the resulting identification was reliable. *See id.* ¶ 48.

¶7 Lebario first claims the trial court erred in finding the photographic lineup had not been unduly suggestive because Detective William Laing, who presented the lineup to both M.M. and M.B., "failed to follow [certain guidelines] to avoid an unduly suggestive lineup." Lebario did not object on this ground below, and our review is therefore limited to fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiting review for all but fundamental, prejudicial error). Because Lebario does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it). In any event, Lebario has provided no controlling, legal authority suggesting Laing was required to follow the guidelines he advances, citing only to a journal entitled "Psychology, Public Policy and Law." We therefore find no error.

¶8 Lebario next claims the trial court erred in concluding the lineup had not been unduly suggestive because the lineup photograph depicted him "wearing an orange prison shirt" and "[t]he remaining five photographs were of men in street clothes."[2] A lineup is unduly suggestive if it "create[s] a substantial likelihood of misidentification by unfairly focusing attention on the person that the police believed committed the crime." *State v. Strayhand*, 184 Ariz. 571, 588, 911 P.2d 577, 594 (App. 1995). However, "[t]here is no requirement that the accused be surrounded by nearly identical persons." *State v. Gonzales*, 181 Ariz. 502, 509, 892 P.2d 838, 845 (1995). "Rather, the law only requires that [the lineup] depict individuals who basically resemble one another such that the suspect's photograph does not stand out." *State v. Alvarez*, 145 Ariz. 370, 373, 701 P.2d 1178, 1181 (1985).

¶9 Lebario's characterization of his clothing as an "orange prison shirt" is not supported by the record. The shirt depicted in the lineup photograph appears coral in color rather than "prison orange," only the collar and shoulder area are shown, and there are no visible markings or insignia. It is therefore not apparent from the photograph that Lebario was wearing a "prison shirt," and we find no abuse of discretion on this ground.[3]

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[2]Laing testified he had selected the particular photograph because Lebario's "eyes were wide open and he's looking straight at the camera." Laing considered another photograph of Lebario, but it had characteristics that made it difficult to "find similar looking photographs" for the lineup.

[3]The testimony at the hearing established that neither witness's identification was influenced by Lebario's clothing. M.M. confirmed that "nothing about the clothing" in the lineup affected her decision. She was not aware the shirt "was state-issued clothing" and picked Lebario's photograph based on "the eyes." M.B. likewise testified she had

Cf. People v. Carter, 117 P.3d 476, 508-09 (Cal. 2005) (lineup not unduly suggestive although defendant only person wearing orange shirt where nothing in photograph identified it as jail-issued clothing).

¶10 We likewise reject Lebario's argument that the color of the shirt alone was sufficient to make him "stand out from the others" such "that the pretrial lineup was unduly suggestive." The lineup consisted of photographs of six Hispanic males of similar age with similar facial characteristics. *See Alvarez*, 145 Ariz. at 373, 701 P.2d at 1181 (requiring lineup "depict individuals who basically resemble one another"). Although Lebario's shirt was distinct, there was no uniformity of clothing among the remaining members of the lineup either. Rather, each individual's shirt differed in both color and style. *Cf. State v. Phillips*, 202 Ariz. 427, ¶¶ 21-22, 46 P.3d 1048, 1055 (2002) (difference in distance from which defendant's lineup photograph taken not unduly suggestive where all lineup photographs taken from slightly different distance). Moreover, as M.M. noted, the color of Lebario's shirt was similar to a red shirt worn by another person in the lineup. Indeed, Laing testified he had positioned Lebario's photograph away from the "individual in the red shirt" because the two were "very similar in appearance." Accordingly, on the record before us, Lebario's shirt did not single him out such that it unfairly focused attention on him. *See Strayhand*, 184 Ariz. at 588, 911 P.2d at 594.

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identified Lebario based on his facial features and "the clothing in the photographs" had not been "at all significant" to her.

¶11 Lebario further asserts the lineup was unduly suggestive because Laing informed M.B. and M.M. they had identified the suspect being held in custody. But, this information was provided to M.B. and M.M. only after they had made their selection from the lineup. And, as the trial court correctly noted, "[c]onfirmation after the choice is made has no effect [and] does not in any way undermine the validity of the identifications made from the photo" identification. *See State v. Richie*, 110 Ariz. 590, 593, 521 P.2d 1136, 1139 (1974) ("[W]here [a] lineup was not suggestive in the first place, . . . subsequent comments cannot taint an initially fair identification procedure or [an] in-court identification.").

¶12 Lebario finally argues the lineup was unduly suggestive in that Laing had "placed [his] photograph in the middle of the top row because he had been trained that this was the position that drew a witness's primary attention." Lebario does not develop this argument beyond a one-sentence assertion and has provided no authority to support it. The argument is therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Dann*, 205 Ariz. 557, n.8, 74 P.3d 231, 244 n.8 (2003) (failure to develop argument constitutes waiver). Even if not waived, Lebario has not cited, nor have we found, any authority to suggest the mere placement of a photograph in a particular location in a lineup is unduly suggestive.[4] Therefore, the trial court did not abuse its discretion in determining the photographic lineup was not unduly suggestive. And because the lineup

[4]Laing testified he had placed Lebario's photograph in the center of the top row in part because "the top row usually got the attention of the witness." However, he also stated Lebario's photograph was originally in another location on the lineup, but he had moved it as it was too close to an individual of very similar appearance.

was not unduly suggestive, Lebario's challenge of the in-court identifications is moot. *See Phillips*, 202 Ariz. 427, ¶ 22, 46 P.3d at 1055.

Identification by K.L.

¶13 Lebario claims the trial court erred in precluding "exculpatory evidence that a DPS officer had taken a . . . photograph" of him with a cellular telephone. He maintains the evidence was relevant to his misidentification defense because K.L. could have viewed the photograph before identifying him in a pretrial photographic lineup and at trial. Two days after K.L. had identified Lebario at trial and testified about the lineup, DPS officer Orion Jeffrey testified, outside the presence of the jury, that he had been present during Lebario's arrest and had used his cellular telephone to take a photograph of him.[5] Lebario sought to introduce evidence that the photograph had been taken. The trial court ruled the evidence was irrelevant and excluded it. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Ruggiero*, 211 Ariz. 262, ¶ 15, 120 P.3d 690, 693 (App. 2005).

¶14 Lebario argues "the trial court's exclusion of the evidence prevented [him] from presenting . . . his theory of defense and denied him his constitutional rights to a fair trial and due process of law." We disagree. "[T]he Sixth Amendment right to present evidence in one's defense is limited to evidence which is relevant and not unduly prejudicial." *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence

[5]The photograph was not available at trial. Jeffrey testified he had "erased it" from his telephone and "couldn't figure out how to recover it."

to the determination of the action more probable or less probable than it would be without the evidence." Ariz. R. Evid. 401.

¶15 Lebario's claim that K.L. might have viewed the photograph is not supported by the testimony at trial. Jeffrey testified that although he may have sent the photograph to a "friend in law enforcement," he did not send the image to K.L. or any other member of DPS. K.L. likewise testified he had not seen any photographs of Lebario that night. Because there was no evidence K.L. had viewed the photograph, evidence Jeffrey had taken it was not relevant to K.L.'s identification and would not, as Lebario claims "have further reinforced [his] defense that [K.L.]'s identification of him was not reliable." Accordingly, we find no abuse of discretion in the trial court's exclusion of the evidence.[6] *See Ruggiero*, 211 Ariz. 262, ¶ 15, 120 P.3d at 693.

Attempted murder sentence

¶16 Lebario also argues that his attempted first-degree murder sentence was illegal because, in light of its use to enhance his sentence, the trial court erred in considering the use of a weapon as an aggravating factor, as well. The state concedes error but asserts that Lebario's failure to object below forfeits appellate review of the issue for all but fundamental, prejudicial error. Lebario contends that, due to the nature

[6]Lebario also discusses several "problems with [K.L.]'s identification," including K.L.'s initial report to the police dispatcher that the driver of the truck was a "black male" and his viewing of Lebario's photograph on television before the photographic lineup. But, as the state points out, this information was presented to the jury, and Lebario questioned K.L. on each subject. The credibility of a witness is an issue for the jury, and we will not reevaluate its determination on appeal. *See State v. Gallagher*, 169 Ariz. 202, 203, 818 P.2d 187, 188 (App. 1991) ("[T]he credibility of a witness is for the trier-of-fact, not an appellate court.").

of the sentencing proceedings, he could not have raised this issue below, and, therefore, fundamental error review would be improper. But even assuming the issue was preserved for appellate review, we conclude this error was harmless.

¶17 Sentencing error is harmless if we can be certain that the same sentence would have been imposed absent the error. *See State v. Pena*, 209 Ariz. 503, ¶ 24, 104 P.3d 873, 879 (App. 2005). Section 13-701(F), A.R.S., requires the trial court to impose an aggravated sentence when it has found only aggravating factors. And here, the court found five aggravating factors but no mitigating factors.[7] Thus, even if this improper factor had not been considered, the court still would have been obligated to impose an aggravated sentence. Consequently, the court's error was harmless.

Disposition

¶18 We affirm the convictions and sentences imposed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

[7]In his reply brief, and without citation to the record, Lebario bases his argument on the assertion that the "court here found numerous mitigating factors and numerous aggravating factors." But the record belies this contention: both the transcript and the minute entry for the sentencing hearing include only aggravating factors; no mitigating factors are mentioned.